A

Salim Investments Pte Ltd v Sutrasegi Sdn Bhd & Ors

B

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22NCVC-897–07 OF 2012
LIM CHONG FONG JC
22 OCTOBER 2015

C

Civil Procedure — Pleadings — Material facts — Whether plaintiff sufficiently pleaded its case — Whether defendant caught by surprise — Detailed response in amended defence — Evidence need not be pleaded — Rules of Court 2012 O 18 r 7

D

Companies and Corporations — Shares — Preference shares — Redemption of — Whether shareholder lawfully exercised right of redemption — Whether company in breach in failing to pay dividends — Whether company in breach in refusing to refund aggregate face value of shares redeemed — Companies Act 1965 s 61(3)

E

Contract — Breach — Subscription and option agreement — Whether shareholder lawfully exercised right of redemption of preference shares — Whether company in breach in failing to pay dividends — Whether company in breach in refusing to refund aggregate face value of shares redeemed

F

Contract — Guarantee — Breach — Deed of guarantee for redemption of preference shares — Whether document amounted to guarantee and indemnity — Whether guarantors liable to pay guaranteed amounts — Contracts Act 1950 ss 77 & 100

G

By a written subscription of shares agreement dated 18 December 2007 ('the agreement'), the plaintiff purchased from the first defendant's 2,500,000 redeemable convertible preference shares ('preference shares') of RM1 each at the subscription price of RM1.10 each in the first defendant. The second to fifth defendants were directors of the first defendant who guaranteed the plaintiff's investment pursuant to a written deed of guarantee dated 18 December 2007 ('guarantee'). On 31 December 2007, the plaintiff paid the first defendant the subscription price for the preference shares amounting to RM2,750,000. Pursuant to cl 5.6 of the agreement, the first defendant was obliged to pay dividends to the plaintiff. The first defendant had paid RM330,000 in dividends to the plaintiff since the issuance of the preference shares. The plaintiff was however discontented with the amount of the

H

I

dividends that was paid by the first defendant and claimed that the first defendant was in breach of the agreement. Accordingly, the plaintiff through its solicitor's letter dated 9 December 2011 demanded the first defendant to rectify its breach. As there was inaction on the part of the first defendant, the plaintiff then through its solicitor's letter dated 13 April 2012 exercised its rights under cl 10.1.1 of the agreement that effectively entitled the plaintiff to immediate redemption of the preference shares. However, the first defendant refused to refund the plaintiff its investment and the plaintiff commenced this suit on 13 July 2012 seeking the refund. Besides defending the plaintiff's claim, the first defendant counterclaimed for RM330,000 mistakenly paid earlier to the plaintiff as dividends. The plaintiff later withdrew its claim against the fourth and fifth defendants. After the close of the plaintiff's case, the first to third defendants submitted no case to answer and elected not to call any witness. The defence of the first defendant was essentially that the Plaintiff had prematurely sought for refund of its investment by reason that it was not yet due. This was because the plaintiff did not exercise cl 5.4 of the agreement and the redemption of the preference shares pursuant to cl 5.3 of the agreement was not yet due at the material time. It was contended that the maturity date only fell on 30 December 2012. Hence, the issue for determination was whether the plaintiff had on 13 April 2012 lawfully exercised its rights under cl 10.1.1 of the agreement. The plaintiff conceded that it did not exercise its rights under cl 5.4 of the agreement as well as that the redemption of the preference shares pursuant to cl 5.3 of the agreement because they were not due until 30 December 2012. However, the first defendant took the point that the plaintiff's case as pleaded was not based on the exercise of cl 10.1.1 of the agreement. The first defendant also contended that the redemption as claimed was incapable of being paid by virtue of s 61(3) of the Companies Act 1965 ('the Act').

Held, allowing the plaintiff's claim and dismissing the first defendant's counterclaim with costs:

(1) Due to the submission of no case to answer, all the evidence led by the plaintiff must hence be presumed to be correct. The plaintiff's case would fail if the plaintiff had not established its case at law or that the evidence led was so unsatisfactory or unreliable that the court should hold that the burden of proof had not been discharged (see para 9).

(2) The plaintiff had sufficiently pleaded its case that was being pursued here. The first defendant had not been caught by surprise either as seen from its detail response in para 11 of the amended defence. It is also clear under O 18 r 7 of the Rules of Court 2012 that the plaintiff is not required to plead evidence (see para 27).

(3) Based on cl 5.6, the first defendant was obliged to pay dividends to the plaintiff amounting to RM440,000 and RM220,000 as at 31 December

2009 and 31 December 2010 respectively. The first defendant however failed to do so. The first defendant had breached cl 5.6 of the agreement by its failure to pay the plaintiff the outstanding dividends amounting to RM330,000. Hence, the plaintiff was justified in exercising its rights as provided in cl 10.1.1 of the agreement on 13 April 2012. Consequential to the exercise of that right, the aggregate face value of all the preference shares together with interest thereon must be paid by the first defendant to the plaintiff (see paras 29 & 36).

(4) The first defendant has disabled itself from finding a new shareholder to raise proceeds for purposes of a fresh issue of shares for purposes of the redemption. It is trite law that a party must not take advantage of its own wrong (see para 41).

(5) The first defendant had not produced or explained the absence of profit for the purpose of redemption of the preference shares. The second and third defendants were in control of the first defendant and they were thus responsible for drawing up and were in possession of the annual profit and loss accounts required under ss 167 and 169 of the Act. They were obliged to produce them for the financial years 2011 and 2012. These accounts were not produced in court. Thus, an adverse inference was to be drawn against them under s 114(g) of the Evidence Act 1950. Hence, there was profit available for the purpose of redemption of preference shares (see para 42).

(6) As a result, the plaintiff was entitled to have the preference shares redeemed by the first defendant for the sum of RM2,750,000 plus interest as at 13 April 2012. The first defendant's counterclaim of RM330,000 for dividends allegedly paid out to the plaintiff mistakenly in the light of s 61(3) of the Act was untenable by reason that the section deals with preference shares redemption and not payment of interim dividends (see para 43).

(7) The second and third defendants as guarantors were liable under cl 1 of the guarantee if the plaintiff was not paid. The guarantee was both a guarantee as well as an indemnity by reason of the clear words in cl 3 of the guarantee. The guarantee was thus governed by ss 77–100 of the Contracts Act 1950 (see para 44).

[Bahasa Malaysia summary

Melalui satu langganan perjanjian saham bertarikh 18 Disember 2007 ('perjanjian'), plaintif telah membeli daripada saham keutamaan boleh tukar yang boleh tebus ('saham keutamaan') pada RM1 setiap satu pada harga langganan RM1.10 setiap satu kepada defendan. Defendan-defendan kedua hingga kelima merupakan pengarah kepada defendan pertama yang menjamin pelaburan plantif berikutan satu surat jaminan bertulis bertarikh 18 Disember 2007 ('jaminan'). Pada 31 Disember 2007, plaintif telah membayar defendan

pertama harga langganan untuk saham keutamaan berjumlah RM2,750,000. Berikutan fasal 5.6 perjanjian, defendan pertama diwajibkan untuk membayar dividen kepada paintif. Defendan pertama telah membayar RM330,000 dividen kepada plaintif sejak saham keutamaan itu dikeluarkan. Plaintif walau bagaimanapun tidak berpuas hati dengan jumlah dividen yang telah dibayar oleh defendan pertama dan mendakwa bahawa defendan pertama telah melanggar perjanjian itu. Sewajarnya, plaintif melalui surat peguamcaranya bertarikh 9 Disember 2011 menuntut defendan pertama memperbetulkan pelanggaran itu. Oleh kerana tiada tindakan di pihak defendan pertama, plaintif kemudian melalui surat peguamcaranya bertarikh 13 April 2012 telah menggunakan haknya di bawah fasal 10.1.1 perjanjian yang secara berkesan memberi hak kepada plaintif untuk penebusan serta-merta saham keutamaan. Walau bagaimanapun, defendan pertama enggan membayar balik pelaburannya kepada plaintif dan plaintif telah memulakan guaman ini pada 13 Julai 2012 memohon bayaran balik. Selain daripada membela tuntutan plaintif, defendan pertama telah menuntut balas untuk RM330,000 yang tersilap bayar pada awalnya kepada plaintif sebagai dividen. Plaintif kemudian telah mengeluarkan tuntutannya terhadap defendan-defendan keempat dan kelima. Selepas kes plaintif ditutup, defendan-defendan pertama hingga ketiga berhujah tiada kes untuk dijawab dan memilih untuk tidak memanggil mana-mana saksi. Pembelaan defendan pertama adalah pada dasarnya plaintif telah memohon secara pramatang untuk bayaran balik pelaburannya dengan sebab ia belum lagi perlu. Ini adalah kerana plaintif tidak menggunakan fasal 5.4 perjanjian dan penebusan saham keutamaan menurut fasal 5.3 perjanjian masih belum perlu pada masa matan. Ia dihujahkan bahawa tarikh matang hanya jatuh pada 30 Disember 2012. Justeru, isu untuk ditentukan adalah sama ada plaintif telah pada 13 April 2012 secara sah menggunakan haknya di bawah fasal 10.1.1 perjanjian. Plaintif mengakui bahawa ia tidak menggunakan haknya di bawah fasal 5.4 perjanjian dan juga penebusan saham keutamaan menurut fasal 5.3 perjanjian kerana ia masih belum perlu sehingga 30 Disember 2012. Walau bagaimanapun, defendan pertama telah menerima fakta bahawa kes plaintif seperti dipli tidak berdasarkan penggunaan fasal 10.1.1 perjanjian. Defendan pertama juga menegaskan bahawa penebusan sepertimana dituntut tidak mampu dibayar menurut s 61(3) Akta Syarikat 1965 ('Akta').

Diputuskan, membenarkan tuntutan plaintif dan menolak tuntutan balas defendan pertama dengan kos:

(1) Akibat penghujahan tiada kes untuk dijawab, semua keterangan yang dikemukakan oleh plaintif mesti dianggap betul. Kes plaintif akan gagal jika plaintif tidak membuktikan kesnya dari segi undang-undang atau jika keterangan yang dikemukakan itu tidak memuaskan atau tidak boleh digunakan sehingga mahkamah patut memutuskan bahawa beban bukti tidak dilepaskan (lihat perenggan 9).

(2) Plaintif telah dengan mencukupi mempli kesnya yang kini sedang dibicarakan. Defendan pertama tidak terkejut berdasarkan tindak balas terperincinya dalam perenggan 11 pembelaan yang dipinda. Ia juga jelas di bawah A 18 k 7 Kaedah-Kaedah Mahkamah 2012 bahawa plaintif tidak perlu mempli keterangan (lihat perenggan 27).

(3) Berdasarkan fasal 5.6, defendan pertama bertanggungjawab untuk membayar dividen kepada plaintif berjumlah RM440,000 dan RM220,000 setakat 31 Disember 2009 dan 31 Disember 2010 masing-masingnya. Defendan pertama bagaimanapun gagal berbuat demikian. Defendan pertama telah melanggar fasal 5.6 perjanjian kerana kegagalannya membayar plaintif baki dividen berjumlah RM330,000. Justeru, plaintif adalah wajar untuk menggunakan haknya sepertimana diperuntukkan dalam fasal 10.1.1 perjanjian pada 13 April 2012. Berbangkit daripada pelaksanaan hak itu, nilai muka agregat semua saham keutamaan bersama dengan faedah ke atasnya perlu dibayar oleh defendan pertama kepada plaintif (lihat perenggan 29 & 36).

(4) Defendan pertama tidak lagi mencari pemegang saham baru untuk mengutip keuntungan bagi tujuan isu baru bagi tujuan penebusan. Ia adalah undang-undang nyata di mana satu pihak tidak patut mengambil kesempatan atas kesalahannya sendiri (lihat perenggan 41).

(5) Defenda pertama tidak mengemukakan atau menjelaskan ketiadaan keuntungan bagi tujuan penebusan saham keutamaan itu Defendan-defendan kedua dan ketiga mengawal defendan pertama dan mereka dengan itu bertanggungjawab untuk merangka dan memilik akaun untung rugi tahunan yang dikehendaki di bawah ss 167 dan 169 Akta. Mereka bertanggungjawab untuk mengemukakannya untuk tahun kewangan 2011 dan 2012. Akaun-akaun tersebut tidak dikemukakan di mahkamah. Oleh itu, satu inferens bertentangan telah dibuat terhadap mereka di bawah s 114(g) Akta Keterangan 1950. Justeru, terdapat keuntungan yang tersedia bagi tujuan penebusan saham keutamaan (lihat perenggan 42).

(6) Oleh demikian, plaintif berhak untuk menebus saham keutamaan oleh defendan pertama bagi jumlah RM2,750,000 bersama faedah setakat 13 April 2012. Tuntutan balas defendan sejumlah RM330,000 untuk dividen yang dikatakan telah dibayar kepada plaintif secara silap berdasarkan s 61(3) Akta itu adalah tidak dapat dipertahankan oleh sebab seksyen itu memperkatakan penebusan saham keutamaan dan bukan bayaran dividen interim (lihat perenggan 43).

(7) Defendan-defendan kedua dan ketiga sebagai penjamin-penjamin yang bertanggungjawab di bawah fasal 1 jaminan itu jika plaintif tidak dibayar. Jaminan itu kedua-duanya jaminan dan juga indemniti oleh sebab perkataan-perkataan jelas dalam fasal 3 jaminan itu. Jaminan itu

dengan itu dikawal oleh ss 77–100 Akta Kontrak 1950 (lihat perenggan 44).]

Notes

For cases on guarantee in general, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 5296–5647.

For cases on material facts, see 2(4) *Mallal's Digest* (5th Ed, 2015) paras 7134–7153.

For cases on preference shares, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 1120–1122.

For cases on subscription and option agreement, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3793–3794.

Cases referred to

Arah Cipta Sdn Bhd v Piala Gagasan (M) Sdn Bhd & Anor [2010] 9 CLJ 964, HC (refd)

Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd [1992] 2 MLJ 615, HC (refd)

Chloride Eastern Industries Pte Ltd v Premium Vegetables Oils Sdn Bhd [2002] 2 MLJ 43; [2002] 1 AMR 561, CA (refd)

Ginvera Marketing Enterprise Sdn Bhd v Tohtonku Sdn Bhd [2010] MLJU 626; [2011] 6 CLJ 799, HC (refd)

Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693, SC (folld)

Kementerian Pertahanan Malaysia & Anor v Malaysia International Shipping Corp Bhd and another suit [2003] 2 MLJ 226; [2003] 3 AMR 21, HC (refd)

Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor [2008] 3 MLJ 81; [2008] 2 CLJ 369, CA (refd)

Muniandy & Anor v Muhammad Abdul Kader & Ors [1989] 2 MLJ 416, SC (refd)

Simetech (M) Sdn Bhd v Yeoh Cheng Liam Construction Sdn Bhd [1992] 1 MLJ 11, HC (refd)

Sio Koon Lin v SB Mehra [1981] 1 MLJ 225, FC (refd)

Su Wee Lip @ Phillip Su v Hj Lassim Abdul Rahman [2009] 1 MLJ 580, CA (refd)

Teknik Cekap Sdn Bhd v Villa Genting Development Sdn Bhd [2000] 6 MLJ 513, HC (refd)

UOB Venture Investments Ltd v Tong Garden Holdings Pte Ltd & Ors [2001] 1 SLR 362, HC (refd)

Yoong Sze Fatt v Pengkalen Securities Sdn Bhd [2011] 4 MLJ 805, CA (folld)

Legislation referred to

Companies Act 1965 ss 61, 61(3), 167, 169

Contracts Act 1950 ss 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88,

89, 90, 91, 92, 93, 94, 95, 96, 97, 98, , 99, 100
Evidence Act 1950 s 114(g)
Rules of Court 2012 O 18 r 7

Beh Chee Wai (George Chong Kok Choy with him) (Lee Perara & Tan) for the plaintiff.
Jamie Wong (Bryan Ho and Aminruddin bin Salleh with her) (Chellam Wong) for the first, second and third defendants.

Lim Chong Fong JC:

INTRODUCTION

[1] This is a suit on recovery of investment in preference shares of a manufacturing and trading company.

[2] The plaintiff is a Singaporean private limited company involved in the business of investments that purchased preference shares of the first defendant.

[3] The first defendant is a Malaysian private limited company involved in the manufacturing and trading of rubber products particularly mattresses.

[4] The second to fifth defendants are individuals and directors of the first defendant at the material time. All of them guaranteed the plaintiff's investment.

[5] This suit has been brought by the plaintiff for recovery of RM4,172,630 owing following the termination of the share investment agreement with the first defendant. Besides defending the plaintiff's claim, the first defendant counterclaimed for RM330,000 mistakenly paid earlier to the plaintiff as dividends.

THE TRIAL PROCESS

[6] Prior to the commencement of the trial, the plaintiff withdrew its claim against the fourth and fifth defendants.

[7] The trial of this suit took two days on 29 June 2015 and 21 July 2015. The trial documents comprised of Bundles A, B1, B2, B3, C, D, E, E1 and F wherein the documentary evidence in Bundles B1 to C were agreed by the parties to be of unconditional status B where the authenticity are agreed but contents disputed. In the course of the trial, exhs P1 to P3 were admitted in evidence.

[8] The plaintiff called the following witnesses who gave sworn evidence:

(a) Andrew Yap Lin Sin ('PW1'), a Singaporean advocate and solicitor who acted for the plaintiff in reviewing the share investment agreement;

(b) Hobart Salim ('PW2'), a director of the plaintiff; and

(c) Terence Selvarajah a/l Peter Selvarajah ('PW3'), the fourth defendant and formerly a director and ordinary shareholder of the first defendant.

[9] After the close of the plaintiff's case, the first to third defendants submitted no case to answer and elected not to call any witness. In consequence and following *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 as well as *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* [2011] 4 MLJ 805 , I hold that all the evidence led by the plaintiff must hence be presumed to be correct. As held in *Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81; [2008] 2 CLJ 369, the plaintiff's case would fail if the plaintiff has not established its case at law or that the evidence led is so unsatisfactory or unreliable that the court should hold that the burden of proof has not been discharged.

[10] The parties thereafter simultaneously submitted their written closing submissions in chief and in reply as directed. Oral clarification with counsel was held on 15 September 2015.

BACKGROUND FACTS

[11] By a written subscription of shares agreement dated 18 December 2007 ('agreement') executed between the parties, the plaintiff agreed to the first defendant's offer to allot and issue to the plaintiff 2,500,000 redeemable convertible preference shares ('preference shares') of RM1 each at the subscription price of RM1.10 each subject to terms and conditions therein.

[12] The relevant terms of the agreement are as set out in following clauses:

> 3.1. The plaintiff shall subscribe to the SI preference shares in the first defendant for the sum of Ringgit Malaysia Two Million Seven Hundred and Fifty Thousand (RM2,750,000) only at the subscription price of Ringgit Malaysia One and Sen Ten (RM1.10) per SI preference share and the first defendant shall effect allotment and issue of the SI preference shares to the plaintiff on the completion date which is the date on which the condition precedents of the agreement are fulfilled.
>
> 5.1. The tenure of the SI preference shares shall be for a period of five (5) years from the date of the first issuance of the preference shares

certificate by the company or for such extended period as may be mutually agreed by the parties in writing.

5.5. The rate of redemption of the SI preference shares, pursuant to the terms herein shall be the aggregate sum which grants the subscriber a total cumulative compounded overall rate of return of fifteen percent (15%) per annum based on RM1.10 per SI preference share for the period commencing the date of issue of the SI preference shares and up to the date of redemption thereof (taking into account and less all accrued and/or outstanding dividends payable or paid in respect of the SI preference shares calculated up to the date of redemption).

5.6 The company shall pay to the subscriber, fixed preferential cumulative dividends in respect of the SI preference shares at the rate of eight percent (8%) per annum based on RM1.10 per SI preference share, which dividend shall be paid in preference to any dividend over the ordinary shares of the company. And such dividend shall be paid in aggregate (that is to say, totalling 16%) on the date corresponding to 2 years after the date of issuance of the SI preference shares, and thereafter at the said rate of 8% per annum on each subsequent anniversary date until redemption of the same or the maturity date, as the case may be, in accordance with the terms herein.

10.1 If :

10.1.1 the company shall default in the payment to the subscriber of any monies in respect of the SI preference shares outstanding and/or any other moneys herein covenanted to be paid after the same shall have become due by the company to the subscriber whether formally demanded or not;

...

(the above events or any one of them being an 'event of default')

then the subscriber may, without prejudice to any of its other rights declare that an event of default has occurred and upon the subscriber giving a written notice to the company the aggregate face value of the all the SI preference shares then outstanding together with interest thereon shall, notwithstanding any other provisions of this agreement, mature and become immediately redeemable by the company. Upon the occurrence of an event of default, without prejudice to the right of redemption as provided for herein or any other right or remedy to which the subscriber shall be entitled to under law, the subscriber may at its sole discretion exercise the right of conversion provided for in cl 5.7 hereof.

[13] Simultaneous with the execution of the agreement, a written deed of guarantee dated 18 December 2007 ('guarantee') was executed amongst the plaintiff and the second to fifth defendants.

[14] The relevant terms in the guarantee are as follows:

1. Consideration

In pursuance of the said agreement and in consideration of the subscriber for the SI preference shares in the company pursuant to and under the subscription agreement, at the request of the company, the guarantors hereby jointly and severally unconditionally guarantee the due performance and fulfilment by the company of all the obligations terms and conditions contained in the subscription agreement, including but not limited to, payment of any and all sums due and payable under the subscription agreement, in the event the company defaults on the same for any reason whatsoever, upon demand in writing by the subscriber.

3. Principal debtors

As between the guarantors and the subscriber, the guarantors shall be liable under this guarantee as if the guarantors are the sole and principal debtors, and not merely as sureties, for all the moneys and sums due and payable hereby guaranteed. Accordingly, the guarantors shall not be discharged, nor shall the guarantors liability be affected, by anything or any fact or circumstance which would not discharge the guarantors or affect their liability if the guarantors were sole principal debtors.

4. Joint and several liability

The guarantors hereby acknowledge that all their liability to the subscriber under this guarantee shall be joint and several and every agreement and undertaking on the part of the guarantor shall be construed accordingly.

[15] On 31 December 2007, the plaintiff paid the first defendant the subscription price for the preference shares pursuant to the agreement amounting to RM2,750,000. The share certificate of the preference shares was thereafter issued to the plaintiff on 20 February 2008.

[16] Pursuant to cl 5.6 of the agreement, the first defendant is obliged to pay dividends to the plaintiff at such amount and frequency as stipulated therein. The first defendant paid RM330,000 in dividends to the plaintiff since the issuance of the preference shares.

[17] The plaintiff was however discontented with the amount of the dividends that was paid by the first defendant and held that the first defendant was in breach of the agreement.

[18] Accordingly, the plaintiff through its solicitors Messrs Lee Perara & Tan's letter dated 9 December 2011 demanded the first defendant to rectify its breach.

[19] As there was inaction on the part of the first defendant, the plaintiff then through its solicitors Messrs Lee Perara & Tan's letter dated 13 April 2012 exercised its rights under cl 10.1.1 of the agreement that effectively entitled the plaintiff to immediate redemption of the preference shares.

[20] By reason of the first defendant's failure to refund the plaintiff its investment notwithstanding its rights to immediate redemption, the plaintiff commenced this suit on 13 July 2012.

CONTENTIONS OF THE PARTIES

[21] The contentions are gathered from the pleadings and as refined in the closing submissions of the parties.

[22] As far as the plaintiff is concerned, this is a plain and straightforward case of recovery of its investment from the first defendant as assessed in accordance with cl 5.5 of the agreement. Since the first defendant has failed to refund the plaintiff, the second and third defendants are also liable to the plaintiff as guarantors and indemnifiers pursuant to the guarantee.

[23] The defence of the first defendant is essentially the plaintiff has prematurely sought for refund of its investment by reason that it wasn't yet due. This is because the plaintiff did not exercise cl 5.4 of the agreement and the redemption of the preference shares pursuant to cl 5.3 of the agreement isn't yet due at the material time. This is because the maturity date fell on 30 December 2012. The plaintiff has however already filed this suit on 13 July 2012, to wit about five months too early and the first defendant in this respect relied on the cases of *Sio Koon Lin v SB Mehra* [1981] 1 MLJ 225, *Simetech (M) Sdn Bhd v Yeoh Cheng Liam Construction Sdn Bhd* [1992] 1 MLJ 11 and *Ginvera Marketing Enterprise Sdn Bhd v Tohtonku Sdn Bhd* [2010] MLJU 626; [2011] 6 CLJ 799. It follows that the second and third defendants would not be liable as guarantors since their liability is only co-extensive with that of the first defendant.

FINDINGS OF THE COURT

[24] After clarification with counsel on 15 September 2015, it seems to me that the dispute here can be reduced into a single issue: that is to say whether the plaintiff has on 13 April 2012 lawfully exercised its rights under cl 10.1.1 of the agreement. In this regard, the plaintiff conceded that it did not exercise its rights under cl 5.4 of the agreement as well as that the redemption of the preference shares pursuant to cl 5.3 of the agreement because they weren't due until 30 December 2012. On the other side, the first to third defendants conceded that if the aforesaid rights under cl 10.1.1 have been lawfully

exercised and claimed here against the first defendant, then the defence of premature commencement of this suit by the plaintiff is no longer tenable. Furthermore, the second to third defendants should be consequently liable as well under the guarantee.

[25] At the outset, the first defendant took the point that the plaintiff's case as pleaded isn't based on the exercise of cl 10.1.1 of the agreement. The first defendant contended parties must plead with sufficient detail and be bound by their pleadings citing the cases of *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416, *Asia Hotel Sdn Bhd v Malayan Insurance (M) Sdn Bhd* [1992] 2 MLJ 615 and *Teknik Cekap Sdn Bhd v Villa Genting Development Sdn Bhd* [2000] 6 MLJ 513 in support of its contention.

[26] I have carefully reviewed the plaintiff's amended statement of claim in particular paras 18 and 19 which read as follows:

> 18. Plaintff has on 09.12.2011 through its solicitors, Messrs Lee, Perara & Tan issued a notice to the First Defendant to demand that the First Defendant rectify its breach and perform its obligations. With regards to this, Plaintiff will refer to clause 10.1.1 of the Agreement. Following on from the same, the First Defendant failed and/or neglected and/or refused to rectify its breach. As such, the Plaintiff had on 13.04.2012 through its solicitors, Messrs Lee, Perara & Tan issued a redemption notice dated 13.04.2012, and in this case. The date of redemption ('Date of Redemption') for the SI Preference Shares is on 13.04.2012.
>
> 19. Pursuant to clause 5.5 of the Agreement, when the Plaintiff exercises the right to redeem the SI Preference Shares, Plaintiff has the right and the First Defendant must pay to the Plaintiff all the investment sum of RM 2,750,000.00 and returns at the rate of 15% per annum on RM1.10 for every SI Preference Share from the date of issuance of the SI Preference Share till the date of redemption.

[27] In the premises, I am satisfied that the plaintiff has sufficiently pleaded its case that is being pursued here. In my view, the first defendant has not been caught by surprise either as seen from its detail response in para 11 of the amended defence. It is also clear under O 18 r 7 of the Rules of Court 2012 and held in *Kementerian Pertahanan Malaysia & Anor v Malaysia International Shipping Corp Bhd and another suit* [2003] 2 MLJ 226; [2003] 3 AMR 21 that the plaintiff is not required to plead evidence. I therefore find and hold that the first defendant's contention on the pleading point is misconceived.

[28] As to the substance of the plaintiff's claim, the contention is basically that the first defendant has breached cl 5.6 of the agreement by failing to pay

dividends to the plaintiff as prescribed therein that resulted in the plaintiff exercising its rights under cl 10.1.1 of the agreement.

[29] Based on cl 5.6, I find and hold that the first defendant is obliged to pay dividends to the plaintiff amounting to RM440,000 and RM220,000 as at 31 December 2009 and 31 December 2010 respectively. In fact, this was admitted in writing by the chief operating officer of the first defendant in his letter to the plaintiff dated 3 November 2010. He proposed an instalment payment plan but the first defendant only paid RM330,000.

[30] For a year between November 2010 and December 2011, the plaintiff through its Singaporean lawyers Messrs Andrew Yap & Co wrote numerous letters dated 18 November 2010, 22 August 2011, 19 September 2011 and 17 October 2011 to request and remind the first defendant as well as later the second to fifth defendants to pay the overdue and outstanding dividends. The first defendant however failed, refused and/or neglected to do so.

[31] The formal legal demand on the first defendant was thereafter made by the plaintiff's solicitors Messrs Lee Perara & Tan's letter dated 9 December 2011.

[32] By reason of the first defendant's continuing failure, refusal and/or neglect to pay the plaintiff the overdue and outstanding dividends amounting to RM330,000 and interests as demanded, the plaintiff exercised its rights under cl 10.1 of the agreement as evidenced by its solicitor's letter dated 13 April 2012 to the first defendant.

[33] From the evidence that emerged at the trial, it appears to me that the first defendant was unable to pay the dividends as promised because of the sluggish economy and tight corporate cash flow. That is not excusable and there is no provision in the agreement to exempt or even postpone the payment of dividends in such an event.

[34] Furthermore as a matter of law, payment of dividends need not necessarily be derived from profit retained as cash but also from assets or property belonging to the company. In the authoritative joint together on textbook *Principles of Company Law* by HAJ Ford (2nd Ed) it is prescribed as follows:

> (1009) Profit available for dividend. The expression 'profit' is used in various ways. One usage refers to a comparison between the state of the business at two specific dates, usually separated by an interval of a year. Under this usage the fundamental meaning of 'profit' is the amount of gain made by the business during the year ...

A (1012) Realised profit on sale of fixed assets may be distributed by way of dividend. Unless restrained by its articles a company may bring a realised profit arising from the sale of a fixed asset into account in determining the profit available for distribution by way of dividend. *Lubbock v British bank of South America* [1892] 2 Ch 198 ...

B (1014) Guaranteed dividends. It is open to those who raise share capital for a company to offer prospective shareholders the inducement of a guarantee by the company's backers that a specified minimum dividend will be paid on the shares for a certain period. The shareholder will then be like a lender in so far as he will be entitled to receive the minimum dividend whether the company makes a profit or not ...

C

[35] From the construction of the agreement as a whole particularly cl 5.6 thereof, I find and hold that the plaintiff's position here is akin to that of a beneficiary of the guaranteed dividends promised by the first defendant. Be that as it may and in any event, I further find and hold that the first defendant is at all material times in the financial position to declare profit and pay dividends to the plaintiff. This is seen from the following table of availability of assets as adduced by the plaintiff and unchallenged by the defendants at the trial:

D

E

	2007	2008	2009	2010
Non-Current Assets	RM9,989,104-00	RM9,685,189-00	RM8,529,681-00	RM7,431,821-68
Current Assets	RM5,385,736-00	RM6,853,972-00	RM6,636,353-00	RM5,393,310-54
Total	RM15,374,840.00	RM16,539,161.00	RM15,166,034.00	RM12,825,132.22

F

G

H

[36] In the circumstances, I find and hold that the first defendant breached cl 5.6 of the agreement by its failure, refusal and/or neglect to pay the plaintiff the outstanding dividends amounting to RM330,000 that was overdue and outstanding at the material time. In the premises, the plaintiff was justified in exercising its rights as provided in cl 10.1.1 of the agreement on 13 April 2012. In other words, that provision has been lawfully and validly exercised by the plaintiff.

I

[37] Consequential to the exercise of that right, the aggregate face value of all the preference shares together with interest thereon must be paid by the first defendant to the plaintiff. Accordingly the plaintiff claimed the following, the amount of which has also not been challenged by the defendants at the trial:

No.	Details of Claim	Amount (RM)
(i)	The Full Redemption of Preference Shares	2,750,000.00
(ii)	The 15% returns from 20.02.2008 to 13.04.2012 (after deducted the payment of RM330,000.00)	1,354,830-00
(iii)	The 15% returns from 14.04.2012 to 13.07.2012	67,800-00
	TOTAL	**4,172,630.00**

[38] The first defendant's contention appears to be that the redemption as claimed is incapable of being paid by virtue of s 61(3) of the Companies Act 1965. Section 61 of the Act reads:

61. Redeemable Preference Shares

(1) Subject to this section a company having a share capital may, if so authorised by its articles, issue preference shares which are, or at the option of the company are to be, liable to be redeemed and the redemption shall be effected only on such terms and in such manner as is provided by the articles.

(2) The redemption shall not be taken as reducing the amount of authorised share capital of the company.

(3) *The shares shall not be redeemed —*

(a) *except out of profits which would otherwise be available for dividend, or out of the proceeds of a fresh issue of shares made for the purposes of the redemption; and*

(b) *unless they are fully paid up.*

(4) The premium, if any, payable on redemption shall be provided for out of profits or the share premium account before the shares are redeemed.

(5) Where any such shares are redeemed otherwise than out of the proceeds of a fresh issue, there shall, out of profits which would otherwise have been available for dividend, be transferred to a reserve called the 'capital redemption reserve' a sum equal to the nominal amount of the shares redeemed, and the provisions of this Act relating to the reduction of the share capital of a company shall, except as provided in this section, apply as if the capital redemption reserve were paid-up share capital of the company.

(6) Where in pursuance of this section a company has redeemed or is about to redeem any preference shares, it may issue shares up to the nominal amount of the shares redeemed or to be redeemed as if those shares had never been issued, and accordingly the share capital of the company shall not for the purposes of any fee under this Act be deemed to be increased by such issue but where new shares are issued before the redemption of the old shares, the new shares shall not, so far as relates to any fee under this Act, be deemed to have been issued in pursuance of this subsection unless the old shares have been redeemed within one month after the issue of the new shares.

(7) The capital redemption reserve may be applied in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares.

In this respect, the first defendant relied on the case of *Arah Cipta Sdn Bhd v Piala Gagasan (M) Sdn Bhd & Anor* [2010] 9 CLJ 964 wherein Hanipah Farikullah JC (now J) held as follows at p 991:

> [97] In my judgment, s 61(3) of the Act limits the funds from which redemption may be made. In this regard, when the time comes for redemption, the redemption monies will have to be paid either out of profits which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of the redemption. *If the plaintiff has no such profits available or is unable to carry through the necessary fresh issue of shares, the consequence will simply be that the plaintiff will then become in breach of its obligation under arts. 6A(d) and 6B(d) of the plaintiff's articles of association. The first defendant being the preferential shareholders would in such circumstances be entitled to have the plaintiff wound up but certainly not to cause redemption in breach of s 61(3) of the Act, preferring themselves ahead of all other creditors of the plaintiff.*
>
> *[98] As stated earlier, the documentary and oral evidence adduced show that the plaintiff company was at the material time when the demand and payments were made to the first defendant for redemption of the redeemable preference shares suffered great losses in which there are no available profit to redeem the shares from the first defendant.* As such, in this present case, in my view, the RPS Shares was redeemed by the plaintiff in contravention of s 61(3) of the Act. (Emphasis added.)

[39] Apposite to the first defendant's contention, the plaintiff relied on the Singapore case of *UOB Venture Investments Ltd v Tong Garden Holdings Pte Ltd & Ors* [2001] 1 SLR 362 wherein GP Selvam J said the following at

pp 367–368:

> Under the contract the obligation to redeem on notice is absolute. When first defendant contracted for that obligation they were fully aware of s 70(3) of the Companies Act. *They must therefore be presumed to have contracted on the basis of section 70(3) of the Companies Act. In the context of s 70(3) of the Companies Act, the company defendants' contractual obligation to redeem implies that they must bustle about to bring in the funds. They must expend all their energy in their veins to find the funds in the manner permitted by s 70(3) of the Companies Act. The defendants are not allowed to call in aid their own indolence and inaction. Nor can they seek shelter under s 70(3) of the Companies Act. Their contractual obligation implies that they will see to it that their subsidiary and related entities and persons will put them in sufficient profits or take up new shares to produce sufficient funds. Finding the funds by those two options, I repeat, is an absolute obligation. If they fail there are three remedies to the preference shareholder: equity can compel them to do so by an order for specific performance; common law can award damages; and company law can order them to be wound up*. If damages are awarded they must come from the profits or fresh share issue. In the event of liquidation the shareholders' claim would rank after the claims of creditors. (Emphasis added.)

The plaintiff further pointed out that the court of appeal in *Chloride Eastern Industries Pte Ltd v Premium Vegetables Oils Sdn Bhd* [2002] 2 MLJ 43; [2002] 1 AMR 561 ordered that the preference shares be redeemed where the company acted oppressively by offering only to redeem the preference shares at a fraction of the issued price.

[40] On the facts of the case herein, I am mindful that the defendants submitted that there was no case to answer. As said in para [9] hereinabove, the plaintiff's evidence as led is deemed to be correct and true. Terence Selvarajah a/l Peter Selvarajah ('PW3'), a former director of the first defendant testified as follows at the trial (pp 14–17 and 21 of the transcript on 21 July 2015):

> BCW: This is your email dated 22.04.2010. From you to Hobart Salim.
>
> TERENCE: Yes.
>
> BCW: Right? Ok. Based on your email, you have mentioned that you were fed up.
>
> TERENCE: Correct.
>
> BCW: You see that?
>
> TERENCE: Yes.
>
> BCW: You see that? One, two, three, the first line on the third paragraph. 'The good news, if you can call it that, is that the rest of the MC also looked fed up.' Alright?
>
> TERENCE: Correct.
>
> BCW: Ok. Can you see that?
>
> YA: What is MC?
>
> TERENCE: Management Committee.

BCW: Ok. Of the First Defendant company. Can you explain to the Court why and what happened?

TERENCE: During that meeting you mean?

BCW: Why people were so fed up?

TERENCE: Oh, because we had been trying to restructure the business for a good part of two years.

BCW: 'We' means who?

TERENCE: The Board of Directors and subsequently, the Management Committee.

BCW: Ok.

TERENCE: Which comprised the directors as well as our CFO and a representative of Pembangunan Ekuiti, which is the private equity firm that had invested in the company.

BCW: Ok.

TERENCE: En Tairuddin.

BCW: En Tairuddin?

TERENCE: That's right.

BCW: Ok.

TERENCE: So, we had tried repeatedly to highlight the weaknesses in the operations and we had tried to restructure the business and given suggestions to the Board, to the management as well as to the directors, to Mr Yap. And none of that was —

BCW: Means Yap Keng Lib?

TERENCE: Mr Yap Keng Lib, yes. But none of that was heeded and the company was just going down further. And there was no more, I felt that there was no more hope to salvage the business at that point. And I think the rest of the committee was also upset that a lot of stuff that we had requested from the MD and particularly from our ... Australian subsidiary at that time, Suretex (10:55:51AM) Pte Ltd in Australia. We were not receiving any information from there.

BCW: What do you mean? You are not receiving any information from the subsidiary —

TERENCE: The subsidiary that was —

BCW: Of the First Defendant company?

TERENCE: Yes.

BCW: In Australia?

TERENCE: That's right, yes.

BCW: Who was managing that subsidiary?

TERENCE: Yap Kheong Gee.

BCW: Besides Yap Kheong Gee, who else?

TERENCE: I believe his wife was also assisting him, Alana (10:56:12AM).

BCW: That means you are saying that throughout the period, they never reported back to the company?

TERENCE: Not adequately, not on time, not based, not the information that we had asked for.

BCW: I see. That means your proposal and En Tairuddin's proposal to restructure the company was not taken place?

TERENCE: I don't think En Tairuddin, it was mostly a proposal done by myself together with a couple, with Adrian Foo, who was the Finance Admin guy at the time.

BCW: I see.

TERENCE: And also —

BCW: Was your proposal accepted?

TERENCE: I don't think it was implemented, no.

TERENCE: Sorry?

BCW: In that sense?

TERENCE: Yes.

BCW: Was that the cause of the downfall?

TERENCE: I had actually, it had led to my, to me leaving the company, yes.

BCW: Alright. What was the arrangement between Hexagon Fleet Sdn Bhd and the First Defendant?

TERENCE: Very similar to the arrangement we had with Salim Investment, where they were the preference shareholder of the company as well.

BCW: I see. So, looking at the arrangement, is it true that basically the plaintiff is coming into the company so that the company can pay off the preference shares or the shares of hexagon Fleet sdn Bhd?

TERENCE: Correct.

BCW: See, the Defendant did another round of capital raising exercise through issuing of preference share to pay off hexagon Fleet Sdn Bhd. Alright? According to your answer. But why didn't the First defendant do another round of capital raising for the Plaintiff?

TERENCE: Capital raising for the ...?

BCW: The same exercise. Why didn't they do the same thing? Like what that have done for Hexagon Fleet? They could have done it for the Plaintiff. Why didn't they do it?

TERENCE: Subsequently you mean?

BCW: Yes. Salim Investment?

TERENCE: I think, yes, I mean, my suggestion to find new investors was not taken up by the directors, by the way.

[41] Consequently it is plain that the first defendant has disabled itself from finding a new shareholder to raise proceeds for purposes of a fresh issue of shares for purposes of the redemption. It is trite law that a party must not take advantage of its own wrong: see *Su Wee Lip @ Phillip Su v Hj Lassim Abdul Rahman* [2009] 1 MLJ 580 wherein Gopal Sri Ram JCA (later FCJ) said at p 590:

> It is a settled principle of general application that a person should not be permitted to take advantage of his own wrong. When applied in the sphere of contract law it expresses itself in the proposition that a guilty party ought not to be permitted to take advantage of his own breach of the contract.

[42] In addition by submitting no case to answer, the first defendant has also not produced or explained the absence of profit for the purpose of redemption of the preference shares. The second and third defendants are in control of the first defendant and they are thus responsible for drawing up and are in possession of the annual profit and loss accounts required under ss 167 and 169 of the Companies Act 1965. They are obliged to produce them for the financial years 2011 and 2012. These accounts were not produced in court. In the circumstances and as submitted by the plaintiff, it is apt and I so hold that an adverse inference be drawn against them under s 114(g) of the Evidence Act 1950. Accordingly I conclude and hold that there is there is profit available for the purpose of redemption of preference shares.

[43] As the result, I find and hold that the plaintiff is entitled as claimed to have the preference shares redeemed by the first defendant for the sum of RM2,750,000 plus interest of RM1,354,830 as at 13 April 2012. The balance of the claim of RM67,800 cannot be allowed as it is not provided for in cl 10.1 of the agreement. In addition, it follows that the first defendant's counterclaim of RM330,000 for dividends allegedly paid out to the plaintiff mistakenly in the light of s 61(3) of the Companies Act 1965 is untenable by reason that the section deals with preference shares redemption and not payment of interim dividends.

[44] As for the second and third defendants as guarantors are concerned, they are in my view clearly liable under cl 1 of the guarantee if the plaintiff has not been paid. As submitted by the plaintiff, I hold that the guarantee upon is true construction is both a guarantee as well as an indemnity by reason of the clear words in cl 3 of the guarantee. The guarantee is thus governed by ss 77–100 of the Contracts Act 1950.

CONCLUSION

[45] For the foregoing reasons, I am satisfied that the plaintiff has established a meritorious case against the first to third defendants.

[46] Accordingly I enter judgment for the plaintiff in the following terms:

(a) the first defendant is ordered to redeem the SI preference shares from the plaintiff at the sum of RM4,104,830 and the first defendant do pay the plaintiff the sum of RM4,104,830 within three months from the date hereof and the interest thereon at 5%pa from 14 April 2012 till full realisation;

(b) if the first defendant fails to fulfil the abovementioned order, the second and third defendants, without prejudice to any other rights and remedies of the plaintiff, are ordered to forthwith pay the plaintiff the sum of RM4,104,830 together with interest thereon at 5%pa from 14 April 2012 till full realisation; and

(c) costs of RM30,000 be paid by the first to third defendants collectively.

[47] For the avoidance of doubt, the first defendant's counterclaim is dismissed.

[48] In addition, I order that the security for costs earlier deposited by the plaintiff as earlier ordered be refunded.

Plaintiff's claim allowed and first defendant's counterclaim dismissed with costs.

Reported by Kanesh Sundrum